In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5496

NATIONAL SECURITY COMPANY, a Corporation,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

Brief of Appellee

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Brief of Appellee

The statement of the case and the facts of the same are substantially those as set forth on pages two to seven of appellant's brief.

ARGUMENT

1

On page 16 of appellant's brief, it is contended that plaintiff herein was bound to prove breach of the condition of the bond by showing that the defendant was

called and did not appear. The Government's contention with reference to this point is that inasmuch as the judgment nisi was properly proven, the fact that the defendant did not appear and was called to appear is presumed. In the case of *Com. v. Fogel*, 3 Pa. Super. 566, it was held that the calling of the accused will be presumed from a record entry of forfeiture. At 6 *C. J.* 1070, we find the following statement:

"In an action on a forfeited bail bond or recognizance it will be presumed, in the absence of evidence to the contrary that the proceedings relative to the character of the bond or recognizance or to the adjudication of the forfeiture were regular and valid such as that the bond or the recognizance was taken by the proper authority legally empowered in the premises."

On page 1071, it is stated:

"The record of a forfeiture of recognizance is conclusive evidence of the breach and cannot be impeached by extrinsic evidence."

In *Fox v. Com.*, 81 Pa. 511, it was held that the entry of the forfeiture stands for proof of all the steps necessary to complete the forfeiture, including the fact that the bail and defendant were duly called and did not appear and answer.

In *Com. v. Basendorf*, 25 A. 779, it was held that an entry "recognizance forfeited" is conclusive that defendant and the bail were called and did not appear.

In *Burrall v. People*, 103 Ill. App. 81, it was held that the judgment of forfeiture and the recognizance are *proper* and *sufficient* evidence to sustain the judgment of absolute forfeiture.

It is therefore contended that the denial in the answer of the allegation in the writ of scire facias that the appellee was called did not raise an issue of fact and it was therefore not error for the trial court to sustain the demurrer to the answer in the case at bar. All that it was necessay for the Government to do in this case was to prove and offer the bond in evidence and prove the judgment nisi, and all the other steps antecedent to the absolute forfeiture will be presumed to have been properly taken.

The Government therefore submits that the denials as set up in pages fifteen to nineteen inclusive in appellant's brief as raising an issue of fact, did not raise any issue of fact at all and it was not error for the trial court to sustain a demurrer to the answer.

II

Appellant, on pages 19 and 20 of his brief, contends that the first affirmative defense in the answer consti-

tutes a good defense. It will be seen that the first affirmative defense alleges in substance that the defendant Unverzagt was first arrested at Blaine, Washington, on May 7, 1925, on a fugitive warrant based on two indictments against him in New York, and habeas corpus proceedings were instituted to test the legality of his arrest. It was alleged in the first affirmative defense that it was in this first proceeding that Unverzagt gave the bond here in question as an appeal bond to obtain his liberty while an appeal was pending on the first habeas corpus proceedings. The affirmative defense then alleges that while the first habeas corpus proceeding was still pending, the defendant Unverzagt was arrested a second time on one of the same New York indictments upon which he was arrested the first time. On the second arrest, it is alleged in the first affirmative defense, he again instituted habeas corpus proceedings, and on the writ being discharged he appealed to this court and pending appeal obtained his release upon a second and entirely new $10,000 property bond with new sureties, and it is further alleged that said appeal was to test the legality of the arrest on one of the indictments said defendant had been originally arrested on at Blaine, Washington; and it is alleged further in said first affirmative defense in said answer,

that said second arrest was on the same charge on which Unverzagt was originally arrested and that said property bond superseded and took the place of the aforesaid bail bond previously executed by this surety. (Tr. 6).

To sustain his contention that the first affirmative defense mentioned above constituted a good defense, appellant cites various cases wherein it is stated that the rule of law is that a re-arrest on the same charge releases the bail. The Government concedes this to be the law but submits that it is not applicable in the present case. The rule as laid down by appellant in his brief on pages twenty and twenty-one is not applicable where the re-arrest is under a second indictment although based on the same transaction as the first, 6 *C. J.* 1027, and cases cited therein. Nor are the former bail released when the new recognizance is before the same court and upon another charge which is part of the same transaction as that upon which the first recognizance was given, 6 *C. J.* 1030.

It is submitted that re-arrest in this case, as stated in the first affirmative defense, was a re-arrest on one of the New York indictments upon which the defendant Unverzagt was arrested the first time, but upon which

one of said New York indictments the second arrest occurred is not alleged in said first affirmative defense. It may not have been an arrest under the same indictment as the first arrest. The failure of the National Surety Company in this case to plead under which indictment the second arrest occurred renders the first affirmative defense demurrable.

On page twenty-two of appellant's brief, it is stated that the second affirmative defense is a good defense and is not demurrable. This defense in substance states nothing but conclusions and ambiguous matter too indefinite and uncertain to state any defense whatsoever to the cause of action pleaded in the writ of scire facias. The pleader in this second affirmative defense pleads nothing but conclusions in the mind of government officers as to what bond was intended to be forfeited in this proceeding. The allegations of this second affirmative defense are not admitted for the purpose of the trial by the interposing of the demurrer, but are admitted for the purpose of the hearing and argument of the demurrer only. It is therefore submitted by the Government that the second affirmative defense herein fails to state facts sufficient to constitute a defense to the cause of action alleged in the writ of scire facias herein. (Tr. 1).

The third affirmative defense is not a proper affirmative defense at all because it constitutes matters which are merely denials, and has no proper place in the portion of the pleading in which new matter and affirmative defenses are to be set up. The same is true with the fourth affirmative defense. Both the third and fourth affirmative defenses are merely repetition and do not state facts sufficient to constitute a defense to a cause of action pleaded in the writ of scire facias herein, and are therefore demurrable.

In *Frank v. Jenkins*, 11 Wash. 611, it was held that where affirmative matter in an answer simply amounts to a denial of the allegations of the complaint, no reply is necessary. It is the Government's position that no reply was necessary to either the third or fourth affirmative defenses on account of the fact that the same merely constituted denials, and that, in fact, no reply was necessary to any of the affirmative defenses which were pleaded in the defendant's answer on account of the fact that a demurrer was interposed to said answer and sustained during the trial of this case, and thus the necessity for serving and filing a reply in this case was obviated. It is also contended that inasmuch as all the Government had to prove to sustain a recovery was the bond in question and the judgment nisi, that the denials

in said answer, both in the general denials and in the affirmative defenses, did not raise issues of fact in the case at bar and constituted no defense to the cause of action pleaded in the writ, and that there was therefore no error to sustain the demurrer to said answer.

IV.

On page twenty-seven of appellant's brief, it is contended that the court erred in granting judgment for the plaintiff, and erred in refusing to grant judgment for the defendant (appellant).

An examination of the transcript and bill of exceptions in this case will reveal that at no time did the appellant herein make any motion for non-suit or for dismissal nor did he at any time place before the trial court by a proper request on motion the question of whether or not the evidence was sufficient to sustain the judgment. (Tr. 22-25).

It is contended on page twenty-eight of appellant's brief that the Government herein should have replied to the affirmative matter in the answer, and from pages twenty-eight to thirty-five, the contention of the appellant herein is set forth at great length as follows in substance: Inasmuch as the Government failed to re-

ply to the affirmative matter set up in the answer, and inasmuch as the Government demurred to the answer, all the allegations of the same are deemed to be admitted.

This is not the law, and never has been the law. When a demurrer is interposed to any pleading, it is true that the facts in the pleading demurred to are admitted for the purpose of the hearing on the demurred, but are not admitted for any other purpose whatsoever. In 31 *Cyc.* 337, we find the following pertinent statement with reference to this point, which we deem to be the law:

"The admissions by demurrer can be used only for the purposes of argument on demurrer, and they are not evidence for the party alleging the facts demurred to."

In the case at bar, if the Government had replied to the affirmative matter in the answer, it would have waived its right to demur to the same. It is a well-settled rule of law that where a demurrer is interposed to a complaint or an answer and then an answer to the complaint or a reply to the answer is served, that the demurred is waived. *Watson v. Kent,* 35 Wash. 21.

The appellant in this case is in effect contending that the Government herein should have filed a reply at the

time of trial and thus waived its right to demur to the answer. In *Ewing v. Van Wagenen*, 6 Wash. 39, it was held that a plaintiff is not called upon to reply to an affirmative defense while his demurrer to a special defense remains undetermined.

It is submitted that the appellant herein is not now in a position to state that the appellee admitted the allegations of the answer herein by failing to reply thereto, when no motion for judgment on the pleadings was made by the appellant herein at the time of trial. In other words, it is submitted that the appellant cannot at this time in the appellate court, say that the appellee herein admits the allegations of the answer when the question of whether or not a failure to reply to said answer constituted an admission of the same was never raised in the trial court. Decisions are legion to the effect that the Circuit Court of Appeals is not required to pass on questions not raised before the District Court. *National City Bank v. Carter*, 14 Fed. (2nd) 940.

In *Asplund v. Mattson*, 15 Wash. 328, it was held that a party when proceeding to trial without raising the objection that a reply constituted a departure from the cause of action set out in the complaint, waives his

right to urge the objection on appeal. *Remington's Compiled Statutes for the State of Washington*, 1922, Section 278, provides as follows:

"If the answer contains a statement of new matter constituting a defense, and the plaintiff failed to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages."

It will be seen that the above statute requires, on the failure of a plaintiff to reply to the answer, that the defendant move for judgment on the pleadings before the plaintiff will be deemed to have admitted the allegations of the answer.

In *Hester v. Stine*, 46 Wash. 469, it was held that an affirmative answer stating no defense requires no reply. The *Hester* case is analogous to the case at bar on account of the fact that the trial court in the present case held that the answer constituted no defense to the cause of action pleaded in the writ. Inasmuch as it was held that the answer constituted no defense, there was no necessity for reply to be filed by the plaintiff herein.

It has been stated herein that the demurrer only admits the allegations of the answer for the purpose of

argument on the same. However, for said purpose, the demurrer does not even admit the conclusions of the pleader. See *Thacher v. Aetna Co.*, 287 Fed. 484.

It will be seen by an examination of the affirmative defense included in the answer of defendant herein that the second, third and fourth affirmative defenses were wholly conclusions. It is, therefore, contended that the demurrer in the present case for the purpose of argument, did not even admit the allegations of said affirmative defenses, and that it was not error for the trial court to sustain a demurrer to the same. In *St. Louis K. & S. E. R. R. v. United States*, 267 U. S. 346, 69 L. Ed. 649, it was held that conclusions of law are not admitted even for the purpose of argument by a demurrer. It is therefore submitted that appellant's contention that the allegations in the answer were admitted by the demurrer and by the Government's failure to reply to said allegations, is without any merit or foundation and reason whatsoever.

V.

It is contended on page thirty-five of appellant's brief, that the trial court decided the case on the demurrer and also gave judgment on the merits.

This is not possible. The court either decided the case on the ground that the demurrer to the answer was well taken or on the ground that sufficient evidence was adduced to prove the case. The decision could not possibly have been made on both grounds legally, although there may be in the bill of exceptions herein some statement by the trial judge leading one to believe to the contrary.

When a demurrer is sustained, the facts alleged in the pleading demurred to are not in the case. 31 *Cyc.* 337, *Doolittle v. Branford*, 22 A. 336. When the trial judge sustained the demurrer in this case, this precluded him from deciding the case on the merits as far as the issues were concerned. The facts in the answer were not in the case after the sustaining of the demurrer. Therefore, it cannot be logically contended that the case was decided not only on the demurrer but also on the merits.

However, if it be contended that the case was decided on the merits, appellant cannot now question whether or not there was any evidence whatsoever to support the judgment. An examination of the bill of exceptions herein (Tr. 24) will disclose that after the demurrer was sustained and evidence adduced, and after the court stated that he had decided the case on both the

evidence and demurrer, no motion for dismissal or specific exception to the court's findings or specific request for findings was made. The rule is, that unless a specific finding is excepted to in the trial court, or a motion for dismissal on account of the insufficiency of evidence is made in a non-jury trial, the question of whether or not the evidence was sufficient to sustain the judgment cannot be raised in the appellate court. *Grainger Bros. v. Amsinck*, 15 Fed. (2nd) 329. In the *Grainger* case the court stated as follows:

"The assignments of error set out in the brief and argued present the single contention, namely, that special findings numbered 23 and 24 were not supported by substantial evidence.

"In *Wear v. Imperial Window Glass Co.*, 224 F. 60, 63, 139 C. C. A. 622, 625, this court said:

" 'When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the Act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, 'for any error of fact.' (Revised Statutes, 1011, U. S. Comp. Stat. 1913, Par. 1672, p. 700), and a finding of fact contrary to the weight of the evidence is an error of fact.

" 'The question of law whether or not there was any substantial evidence to sustain any such finding is re-

viewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial. * * * An exception to any ruling which counsel desires to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling.'

"See, also *First National Bank of Ardmore v. Litteer* (C. C. A. 8) 10 F. (2d) 447.

"At the trial below, counsel for Amsinck & Co. did not by specific exception to the findings, by request for additional findings, or by motion or other like action, challenge the sufficiency of the evidence to support the findings, and did not sharply call to the attention of the trial court the alleged error which it now urges. It follows that the matters assigned as error are not open to review here.

"The judgment is therefore affirmed."

In the *City of Sidalia v. Chalfont*, 4 Fed. (2d) 350, it was held that a question not raised in the trial court cannot be considered on appeal.

In *Blumenfeld v. Mogi*, 295 Fed. 123, it was stated as follows:

"In order to present for review the question as to whether or not the evidence is sufficient to support the

judgment of the court, the complaining party must as a predicate before the judgment is rendered and during the progress of the trial, move the court for judgment in his favor. If he fails so to do, even though he excepts to the judgment after its rendition the appellate court is without power to review the sufficiency of the evidence set out in the bill of exceptions to support the judgment excepted to. The reason of the rule is that in such a case there is no ruling during the progress of the trial to be presented for review. As in the case of a judgment upon the verdict of a jury, an exception to the judgment after it has been rendered presents nothing for review. *Norris v. Jackson*, 9 Wall. 125, 19 L. Ed. 608; *Insurance Company v. Folsom*, 18 Wall. 237, 21 L. Ed. 827."

In the case of *Bank of Waterproof v. Fidelity & Deposit Company of Maryland*, 299 Fed. 478, certiorari denied, 45 S. Ct. 98, it was held that to secure review of evidence by the appellate court in a trial by court without a jury under a written stipulation waiving a jury, the appellant must have moved for judgment and excepted to the court's refusal thereof; exception to the judgment alone not presenting anything for review.

It will therefore be seen that on account of the fact that the appellant in the present case failed to move for a dismissal below on account of the insufficiency of the evidence, he cannot now in the appellate court question

the sufficiency of the same to sustain the judgment entered. To the same effect, see *McFarland v. Central National Bank*, 26 Fed. (2d) 892; *Southern Surety Company v. United States*, 23 Fed. (2d) 55.

On page thirty-seven of appellant's brief, it is stated that there was no proof whatsoever that there was any judgment and order of the District Court discharging the writ of habeas corpus and ordering Unverzagt's removal to the federal court.

In the order denying motion for new trial (Tr. 17) it will be seen that the following entry was made in the order denying motion for new trial therein:

" 'May 7, Ent. record hearing on writ. Writ to be discharged, appeal bond fixed at $10,000.00 and order of removal granted in default of bail, and motion for stay of proceedings granted until A. M. Friday for entry of final order'; that petition for appeal was filed on May 9th, and order entered allowing the same; and it further appearing that all the parties treated said order and minute entry of May 7th as a final order, and the court being of the opinion that the petition for rehearing should be denied. Now, therefore,

"IT IS HEREBY ORDERED that the National Surety Company's petition for new trial and rehearing be and the same is hereby denied.

"To which the defendant, National Surety Company, excepts and exception is hereby allowed.

"Done in open court this 28th day of June, 1927.

"JEREMIAH NETERER, Judge."

In the above order denying petition for new trial it appears that the court was cognizant of and aware of the fact that he had discharged the writ of habeas corpus and ordered the defendant Unverzagt removed, although apparently no final order was entered. It will also appear from said order denying appellant's motion for new trial herein that all the parties at the hearing on said motion for new trial considered the minute entry set forth above in said order denying said motion for new trial as a final order.

VI.

On pages thirty-eight to forty-three of appellant's brief, it is contended that there is no proof whatsoever that the defendant Unverzagt was called and failed to appear.

An examination of the bill of exceptions in this case (Tr. 23) will show that the clerk testified that the defendant Unverzagt was called in May, 1925, and that forfeiture was made on May 13, 1925, according to the

docket. This, it would seem, is sufficient to prove that the defendant Unverzagt defaulted, failed to appear, and was called. In *Com. v. Fogel*, 3 Pa. Super. 566, it was held that the calling of the accused will be presumed from a record entry of forfeiture. In *State v. Holtdorf*, 61 Mo. App. 515, it was held that the defendant or sureties need not be called prior to forfeiture inasmuch as they should know when they are supposed to be in court.

"The record of the forfeiture of a recognizance is conclusive evidence of the breach and cannot be impeached by extrinsic evidence." 6 *C. J.* 1071.

In *Fox v. Com.*, 81 Pa. 511, it was held that the entry of the forfeiture stands for proof of all the steps necessary to complete the forfeiture, including the fact that the bail and defendant were duly called and did not appear and answer.

In *Com. v. Basendorf*, 25 A. 779, it was held that:

"An entry 'recognizance forfeited' is conclusive that defendant and the bail were called and did not appear."

It has also been held that the recognizance of record and the judgment of forfeiture are *competent* and *sufficient* evidence under appropriate averments in scire

facias to authorize judgment of execution according to the form, force and effect of the recognizance. *Burrall v. People*, 103 Ill. App. 81.

The appellee herein submits, in view of the fact that the bill of exceptions shows judgment nisi and shows that the defendant was called, that the trial court did not err in granting judgment for the Government herein. It is submitted that the fact that the defendant failed to appear and defaulted will be presumed after the judgment nisi has been proven.

At this time, we wish to call to the Court's attention Section 2235, *Remington's Compiled Statutes for the State of Washington*, 1922, which provides as follows:

"Action on Recognizance not to be Barred, etc.—No action brought on any recognizance given in any criminal proceeding whatever shall be barred or defeated, nor shall judgment be arrested thereon, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, or by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court or before what justice the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance; and a recognizance may be recorded after execution awarded."

In view of the above statute, it would seem that the omission to note the default of the defendant of record would not effect the validity of the bond forfeiture proceedings. It would seem, also, that all the other minor defects of the bond forfeiture proceedings, if any, are to be disregarded.

On page forty-five of appellant's brief, it is contended that there is no proof or allegation that the surety was called to produce the defendant.

The Government's answer with reference to this contention is simply that it is not now, nor never has been, necessary to call the surety to produce the defendant, or even necessary to give the surety notice to produce the defendant.

In support of appellant's contention, he cites a quotation from 3 *R. C. L.*, page 62, Section 75, which states in substance that where a recognizance is in form several rather than joint, it is necessary to call the surety. Such citation, however, is not applicable here. The bond, in the first paragraph, states that the principal and surety obligate themselves jointly and severally (Tr. 25). In *Southern Surety Company v. United States*, 23 Fed. (2d) 55, it was held that it was no defense to the forfeiture that the surety was not called

to produce the principal or that the bond was not forfeited at all as against the defendant surety. At 6 *C. J.* 1046, we find the following statement:

"It has been held that if there has been a default on the part of the principal, he is the only one to be called and notified, and that a forfeiture of the recognizance may be declared or entered without calling the sureties and without previous notice to them unless such notice is required by statute. It has also been held that no notice need be given the surety to produce the principal on the day the bail is forfeited."

The Government therefore submits that it was not necessary to prove that the surety was called to produce the defendant.

VII

At the bottom of page forty-five of the appellant's brief, it is stated that there is no proof of authority under or by which the bail bond was given. It is further stated on the same page, that it is essential that plaintiff's scire facias proceedings allege and prove that the bond was given pursuant to some lawful authority.

Assuming, but not conceding that plaintiff's writ of scire facias in the instant proceedings, is defective for failure to allege that the bond is given pursuant to some lawful authority, the appellant herein failed to move

against said writ or to demur to the same or to attack the validity of the same in any manner whatsoever in the trial court. He has therefore waived his right to have the insufficiency of the writ considered on appeal.

In 6 *C. J.* 1070, we find the following pertinent statement with reference to this point:

"In an action on a forfeited bail bond or recognizance, it will be presumed, in the absence of evidence to the contrary, that the proceedings relative to the taking of the bond or the recognizance, or to the adjudication of the forfeiture were regular and valid, such as that the bond or the recognizance was taken by the proper authority legally empowered in the premises."

An examination of the answer of the surety company herein (Tr. 4 to 8) will disclose that in no place did the appellant herein deny, or allege affirmatively, that there was no order of a court or officer of competent jurisdiction, fixing or allowing the bond. In the absence of such a denial, or evidence on the part of the appellant herein that there was no such order fixing or allowing the bail, it will be presumed that the bond was given pursuant to lawful authority.

VIII

On page forty-six of appellant's brief, it is stated that there is a fatal variance between the allegations

and the proof, and that the bond sued upon in the writ is not the bond proved. However, the appellant in this case has waived his right to rely on a variance between the bond alleged and the bond proven, on account of the fact that there was no objection on the part of the appellant herein to the admission of the bond in evidence when said bond was offered in evidence by the Government. (Tr. 23). If there is a variance between the bond proven and the bond alleged, the defendant waives the variance and acknowledges the same as not fatal by failure to object to the bond at the time it was offered in evidence. *Wellborn v. People*, 76 Ill. 516; 6 C. J. 1073.

In *Lewis v. State*, 39 S. W. 570, it was held that an objection that there is a variance between the bond and the recitals in the writ of scire facias is waved unless there is an objection to the admission of the bond into evidence.

It is contended, on the part of the Government, that the covenant in the bond in the case at bar (Tr. 25), which provides that the defendant Unverzagt would obey the orders of the Circuit Court of Appeals, and surrender himself in execution of the judgment and decree appealed from if the Circuit Court shall affirm the

order appealed from, required by implication the appearance of the defendant Unverzagt before the lower court when mandate from the upper court was sent down affirming the case.

The case of *United States v. Murphy*, 261 Fed. 751, (8 C. C. A.), cited in appellant's brief on page fifty, is not in point on account of the fact that the court held in that case that the covenant on the part of the surety that the defendant would appear and abide by all orders made by the Circuit Court of Appeals did not require the appearance of the defendant for re-trial in the District Court. It will be seen at once that in the *Murphy* case the conditions of the bond and the facts of the case are not parallel to the facts in the case at bar.

It is contended by the Government that the fact that the bond sued on in the writ of scire facias was described in one portion of the writ as a property bond, was immaterial on account of the fact that, at the outset, in the first paragraph of said writ (Tr. 2), the National Surety Company is mentioned as the surety on the bond in question and it is believed that the court may take judicial cognizance that a well-known surety company, such as the National Surety Company, does not deal in property bonds.

IX.

It is contended by the appellant that the bond sued upon is utterly void because no final order was ever made. It will, however, be seen by an examination of the order denying motion for new trial herein (Tr. 17) that all the parties considered the order of the court discharging the writ and ordering the defendant removed, entered on May 7th, which was a minute entry, as a final order.

It is also contended by the appellant that inasmuch as there was no final order, no appeal was properly allowed on account of the fact that an appeal must be from a final judgment. This contention, however, can not be taken seriously on account of the fact that all the parties at the time the writ was discharged, considered the minute entry as a final order, as appears more fully from the order denying the motion for new trial herein (Tr. 17).

Counsel's contention, also, that no appeal was properly allowable in the instant case is without merit because the Circuit Court for the Ninth Circuit assumed jurisdiction in this case and affirmed the judgment of the lower court which discharged the writ of habeas

corpus. *Unverzagt v. United States*, 5 Fed. (2d) 494. Counsel for the appellant cites many cases on pages fifty-eight, fifty-nine and sixty in substantiation of his contention that where no appeal was allowable, no action can be maintained on the appeal bond.

The Government concedes this to be the rule where the appeal was dismissed prior to the Circuit Court taking jurisdiction of the case. In the case of the dismissal of an appeal, no action can properly be taken on an appeal bond on account of the fact that there is no consideration for said bond. However, where the appeal has not been dismissed and is improperly taken and improperly allowed, but the upper court takes jurisdiction, the appeal bond is valid and an action on the same is maintainable because there is consideration for the same and the principal has been released in consideration of the execution of the bail bond, and even though the upper court holds the appeal is improper the surety is still liable on the appeal bond. In the case at bar, the Circuit Court assumed jurisdiction of the case, and assuming, but not conceding that it now appears that the appeal was not properly allowable, still an action may be properly maintained on the appeal bond for failure of the defendant Unverzagt to obey the orders of the trial court. In the present case the ap-

peal was not dismissed prior to the taking of the jurisdiction of the case by the upper court as was the case in the numerous citations cited by counsel for appellant on pages fifty-eight, fifty-nine and sixty of his brief.

By executing an appeal bond and thereby in effect obtaining the contemplated benefits pending the disposition of the appeal, the parties may estop themselves from asserting certain defenses to liability upon the bond. The general principle is that the obligors are estopped from denying their liability when the bond has subserved the purpose for which it was given and appellant has had the benefit of it. 4 *C. J.* 1269.

"An appeal bond is not void because the judgment appealed from is void, and the appeal was taken to a court without jurisdiction." *Tanquary v. Bashor*, 94 Pac. 22.

In this case the court stated:

"It is conceded here, and the record so shows, that the effect of the giving of the appeal bond sustained the execution of the judgment appealed from, that no attempt was made to enforce it during the pendency of the appeal, and both parties took the appeal bond as sustaining all action upon the judgment in question. This is a sufficient consideration for the execution of a bond and the surety is not released because of the alleged defect as stated."

In *Summit v. Coletta*, 78 A. 1047, it was held that an appeal bond not given for an illegal purpose, complying substantially with the statute, and voluntarily entered into, will be held binding although proceedings prior to its execution may have been irregular.

In *Fulton v. Fletcher*, 12 App. (D. C.) 1, it was held that in a suit upon an appeal bond, a collateral attack upon the jurisdiction of the appellate court upon the ground that the appeal was from an interlocutory order and not a final decree, cannot be sustained where that court has discretionary power to entertain appeals from interlocutory orders, and it assumed the jurisdiction in the order appealed from.

In the case of *Barrett v. Grimes*, 63 Pac. 272, the defendants appealed from an order of the probate court appointing plaintiff administrator of a decedent's estate. The case was heard on the appeal in the District Court and the judgment sustained. It was held that although no appeal was allowable from such an order, there was sufficient consideration for the appeal bond and the defendants were estopped from denying its validity.

In *McVay v. Peddie*, 96 N. W. 166, the court stated:

"In this case the appellant obtained by his proceedings, all that he had stipulated for in the instrument in suit. He had a trial upon the merits in the District Court where the judgment was rendered, to which all parties acquiesced, and during the pendency of the proceedings, he remained in possession of and enjoyed the fruits of the demanded premises. The absence of jurisdiction in the District Court did not affect him injuriously, and whether the judgment which was there recovered, was void or voidable, it was rendered at his instance and he cannot be justly permitted to attack it collaterally in an action upon an undertaking by which he deliberately promised to respond in damages if it should be adverse to his desires."

On page sixty-one of appellant's brief, it is stated that each and every point raised in the appeal was presented specially in the written motion for new trial (Tr. 13), which was denied after hearing (Tr. 16). It is within the discretion of the trial court to deny a motion for new trial, and such a ruling is not reviewable on appeal. *Southern Surety Company v. United States*, 23 Fed. (2d) 55.

It is therefore submitted that the trial court properly sustained the demurrer in this case and that the judgment should be affirmed. It is contended that the Government's case, even if it should be found that the trial court improperly sustained the demurrer, should not

be dismissed on account of the fact that when the demurrer was sustained, the facts pleaded in the answer were out of the case and not considered.

It is also submitted that the case should not be dismissed by the upper court on account of the fact that sufficient proof was adduced to warrant recovery and also because the appellant herein did not properly question the insufficiency of the evidence to sustain the judgment during the trial below.

Respectfully submitted,

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